No. 92-1728

IN THE

Supreme Court Of The United States

October Term, 1992

JAMES L. TAYLOR, *et al.*,

Petitioners

v.

LIBERTY NATIONAL LIFE INSURANCE COMPANY, *et al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The petitioners James L. Taylor, *et al.*, respectfully submit this reply to the brief in opposition filed by respondent, Liberty National Life Insurance Company.

REASONS FOR GRANTING THE WRIT

I. The district court's decision that the final judgment in *Battle* bars subsequent claims for money damages by absentee class members even though they were given no notice of the *Battle* action conflicts with the decisions of this Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950) and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

In its brief in opposition, Liberty National argues that no notice was required to be given to the petitioners' decedents, Mr. and Mrs. Taylor and Mr. Elrod, because they had no claim for money damages at the time the final judgment was entered in 1978. The Supreme Court of Alabama in its decision in *Taylor v. Liberty Nat'l Life Ins. Co.*, 462 So. 2d 907 (Ala. 1984), found that the paid-up policyholders, such as the

Taylors and Mr. Elrod to whom no notice was directed by the district court, "stood to lose *vested property rights* under paid-up burial insurance policies." (p. A-57).[1] 462 So. 2d at 913 (emphasis added). The court found that Liberty National had "obtained affirmative relief (amounting to millions of dollars) at the expense of the policyholders . . . " and concluded that "[a] more classic taking of property can hardly be imagined." (p. A-57, 58). *Id.* In 1978, when the final judgment was entered, the Taylors and Mr. Elrod had paid-up policies which entitled them to a casket and funeral services at their deaths. The district court stripped the Taylors, Mr. Elrod, and other paid-up policyholders of their contractual rights under their policies by reforming the policies to eliminate the policy benefits to which they were entitled under Alabama law.

The rights of paid-up policyholders under their policies were vested rights which were entitled to constitutional protection. The reformation of the policies by the final judgment had the same impact on the legal relationship between the parties as a repudiation of its contractual obligations by Liberty National. If Liberty National had unilaterally taken the action which the district court directed in the final judgment, the policyholders would have had an immediate claim against Liberty National and a right to sue for damages for breach of contract. In *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), this Court held that the termination of a party's right to assert a claim deprives the party of "property rights" and requires notice and hearing meeting constitutional requirements. 339 U.S. at 313.

Considered in the light of the constitutional protections to be afforded, there is no distinction between the rights which the paid-up policyholders had in 1978 at the time of the final judgment and the rights they would have had upon their deaths. They had purchased a casket and burial services to be provided when they died. Their rights under their policies were vested and were "constitutionally recognized property interest[s]" which could not be taken from them without no-

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[1] Citations (p. A-____) are to Appendix to Petition for Writ of Certiorari.

tice and the opportunity to be heard and to participate in the litigation. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985).

There is no dispute as to the effect of the final judgment upon the rights of paid-up policyholders under their policies. The district court found that the effect of the final judgment was "monetary in nature" because it determined "the actual dollar value" of the burial policies. (p. A-38). *Battle v. Liberty Nat'l Life Ins. Co.*, 770 F. Supp. 1499, 1519 (N.D.Ala. 1991). The policyholders' rights under their policies were determined by the final judgment and the final judgment was used by Liberty National to bar the policyholders' claims for money damages for breach of Liberty National's obligations under its burial policies. The claims for money damages which the petitioners now seek to assert existed at the time of the final judgment and were determined by the final judgment. These claims cannot be barred unless petitioners were given notice of the action and the opportunity to be heard and participate in the proceedings. *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 811-812.

Liberty National has failed in its attempt to distinguish the holding of this Court in *Mullane*. Liberty National initially asserts that in *Mullane* "the plaintiffs sought *exclusively* monetary relief, unlike the policyholder class in the instant case, which sought (and received) equitable relief in the form of reformation of the policies." (Liberty National Brief in Opposition, p. 7) (emphasis in original). In fact, in *Mullane* the plaintiff was the trustee bank which had sought to settle the accounts of the holders of a common trust fund. The relief sought by the bank in *Mullane* was a type of declaratory relief very similar to the relief provided Liberty National in the final judgment by reforming its outstanding burial policies. As noted above, this Court found that the declaratory relief sought by the trustee in *Mullane* could result in depriving the beneficiaries of the trust of "property rights" and that as a result "notice and hearing must measure up to the standards of due process." 339 U.S. at 313.

Liberty National next argues that "[t]he interests of the plaintiffs in *Mullane* were divergent and potentially conflict-

ing" and that *Mullane* recognized that notice requirements may be relaxed based upon an examination of the cohesiveness of the class. (Liberty National Brief in Opposition, p. 8-9). Liberty National is wrong on both counts.

The rights of holders of interests in the common trust fund in *Mullane* were identical. This Court found that "[t]he rights of each in the integrity of the fund and the fidelity of the trustee are shared by many other beneficiaries." 339 U.S. at 319. The interests of holders in the fund, which this Court found to be "identical with that of a class", were extraordinarily cohesive. *Id.* Despite this cohesiveness, this Court held that notice by mail must be given to all members of the class whose names and addresses are available and notice by publication must be given to reach those whose whereabouts are unknown.

Liberty National cites *Mullane* as requiring only "notice reasonably certain to reach most of those interested" when the interests of class members are cohesive and argues that individual notice to the burial policyholders was not required. (Liberty National Brief in Opposition, p. 8, citing 339 U.S. at 319). The cited language in the *Mullane* opinion was set forth by the Court as a basis for its holding that "personal service of citation" on holders of interests in the fund was not required. 339 U.S. 318-319. It is clear from the *Mullane* opinion that "notice reasonably certain to reach most of those interested" can only mean notice by mail to those whose names and addresses are available, supplemented by notice by publication to persons who addresses are not known. In the present case Liberty National is unequivocally on record as stating that the names and addresses of members of the policyholder class "*may be obtained through reasonable effort.*" (R. II-96, 97) (emphasis added). "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U.S. at 318.

Petitioners have argued consistently that the policyholder class was improperly certified as a Rule 23(b)(2) class and the Supreme Court of Alabama in *Taylor* so held. (p. A-58). 462 So. 2d at 913 ("[T]he policyholders should have been certi-

fied as a 23(b)(3) class in order to avoid due process violations.") However, at this point, whether the policyholder class was properly certified is not a significant issue. The notice to be given to members of the policyholder class is dictated by constitutional requirements, not the procedural label that may be placed on the action.

II. The district court's decision that due process does not require that absentee members of the policyholder class in *Battle* be given the opportunity to opt out or remove themselves from the action in order to bar subsequent claims for monetary damages is in conflict with the decision of this Court in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

Liberty National argues in its brief in opposition that *Shutts* is inapplicable in the present case because the policyholder class was a cohesive class seeking primarily equitable relief. Liberty National is again wrong on both points.

First, there is no suggestion in *Shutts* that class cohesiveness in any way compromises the mandatory requirement that opt out rights must be provided if claims for money damages by absentee class members are to be barred. The class of plaintiffs in *Shutts* was very cohesive. Each of the 33,000 members of the plaintiff class certified in *Shutts* asserted an identical claim for the recovery of interest on royalty payments. 472 U.S. at 800-801.

Secondly, it is clear that the claims of the policyholder class cannot be categorized as claims primarily for equitable relief. The policyholder plaintiffs had requested $60 million in treble damages for antitrust violations and $60 million in punitive and compensatory damages for fraud. (p. A-11). 770 F. Supp. at 1505. In addition, as noted above, the effect of the final judgment was "monetary in nature" because it determined the "actual dollar value" of the class members' burial policies. (p. A-38). 770 F. Supp. at 1519. These monetary claims cannot be barred unless members of the class are given the right to opt out of the action. *Phillips Petroleum Co. v. Shutts*, 472 U.S. at 812.

III. The district court's decision that individual notice to absentee members of the policyholder class in *Battle* was not required is in conflict with the decision of the Supreme Court of Alabama in *Taylor v. Liberty National Life Insurance Co.*, 462 So. 2d 907 (Ala. 1984).

Liberty National argues that the decision of the Supreme Court of Alabama in *Taylor* was "predicated wholly upon an assumption . . . that the policyholder class should have been certified as a Rule 23(b)(3) class rather than a Rule 23(b)(2) class." (Liberty National Brief in Opposition, p. 10). This position is incorrect.

The decision of the Supreme Court of Alabama was not based upon an assumption. The court in *Taylor* reached and decided the due process issue. "[W]e have no difficulty in holding that these policyholders were entitled to some form of notice." (p. A-58). 462 So. at 913. The court found that the notice given to the Taylors did not constitute "due process for the taking of substantial property rights." (p. A-61). 462 So. 2d at 915. The court in *Taylor* decided the notice issue in a manner which conflicts directly with the decision of the district court.

Liberty National also asserts that the decision of the court in *Taylor* was not a final judgment entitled to preclusive effect. While the court may have had the right to reverse its holding on a subsequent appeal, it is clear that its decision was binding on the trial court in any further proceedings. Liberty National obviously considered the decision as binding because it acted immediately following issuance of the decision in *Taylor* to attempt to enjoin further proceedings in *Taylor* in the trial court. The Court of Appeals for the Eleventh Circuit recognized the decision in *Taylor* as a "due process holding." *Battle v. Liberty National Life Insurance Co.*, 877 F.2d 877, 882 (11th Cir. 1989).

CONCLUSION

Petitioners respectfully submit that their petition for certiorari should be granted. The decisions of this Court in *Mullane* and *Shutts* both involved extremely cohesive classes.

There is no suggestion in either decision that this Court considered the cohesiveness of the class as in any way defeating the requirement that notice of the action must be given to all absentee class members if claims for money damages are to be barred in a subsequent proceeding. Similarly, the cohesiveness of the class has no impact on the mandatory requirement that opt out rights must be provided for absentee class members if claims for money damages are to be barred. The holding of the Supreme Court of Alabama in *Taylor* was a due process holding on the notice issue and is in direct conflict with the decision of the district court.

Respectfully submitted,

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